APPELLATE COURT OF ILLINOIS.

FOURTH DISTRICT.

July Term A. D. 1880.

WM. H. POWEL, et al.
vs.
BOARD OF DIRECTORS OF SCHOOLS.

Appeal from St. Clair Co.

APPELLATE COURT OF ILLINOIS.

FOURTH DISTRICT.

July Term A. D. 1880.

WM. H. POWEL, et al.
vs.
BOARD OF DIRECTORS OF SCHOOLS.

Appeal from St. Clair Co.

BRIEF OF APPELLEES COUNSEL

Bill alleges that complainants are owners of real and personal property, subject to taxation for common school purposes within the corporate limits of School District Number 4, in Township 1, N. R. 8 W., in St. Clair County, containing not less than twelve thousand inhabitants. That the School Board of that District has levied taxes &c., and controls the same for the purpose of giving the children of said district a good common school education.

That said Board has no power to prescribe any studies, other than the branches of education prescribed in the qualification for teachers, to-wit: Orthography &c., and such other branches of an English education, including

vocal music and drawing, as the said Board of Education or the voters of the district at the annual election of Directors may prescribe.

Complainants further allege that said Board without authority are using the common schools of said district for instruction in the branches of a German education and have employed teachers to teach and are teaching in said schools German Orthography, German Reading, German Penmanship and German Grammar, and are misappropriating and diverting the common school fund to the teaching of said German branches.

Complainants further represent that said Board of Education have employed a large number of teachers on account of the qualification to teach said branches of a German education and are paying said teachers out of the School Fund. That this is against public policy and void.

The bill then calls for an answer, and puts a number of specific questions, viz:

1. Give the name of teachers and what salary each gets.

2. Give names of teachers which instruct in the branches of a German education.

3. What studies are taught in said schools in the German language, by whom taught? the salary paid.

4. How many children are instructed in the German language.

5. How many pupils in the schools receive instruction in the German language only.

How many German classes are there in said schools, and how much time is diverted to each class each day for instruction in German.

Bill concludes with prayer of an injunction against the Directors to permit or to cause any branch of a German Education to be taught in said schools and to pay directly or indirectly out of the common school fund derived by

taxation for the support of the common schools of said district any money &c.

The answer is very full as to all the questions asked, and shows that the learning of German is optional, that about 90 per cent of all the pupils attend the German lessons. That German has been taught for the last 15 years in the Belleville schools. That the people by a large majority at the last election of directors approved of the teaching of German, that no pupils receive lessons in German only, that the teaching of German does not add to the costs of the school and does not increase taxation, that all teachers capable of instructing in German, teach also the English branches in their respective classes.

That one hour per day is devoted to the German, except in the lowest grade, where but thirty minutes are allowed for the teaching of that language.

Answer denies that the Board are acting without authority.

Bill dismissed by Circuit Court on hearing.

Appeal taken by Complainants.

The answer not being controverted and therefore taken as true, leaves really but one fact to consider, upon which complainants can rest their complaint, and that is, that the Board of Directors have allowed the teaching of the German language to be one of the branches of the education in the schools of the districts.

We will premise here, that the bill seems to proceed upon the idea, that the means for the support of schools are solely derived from taxation, to which they as citizens of the district in question contribute. But this is a mistake. Congress has granted to each township in the State of Illinois, the 16th Section *for the use of schools*, and this section has been sold and the proceeds thereof constitute part of the school fund. Congress has besides granted to the State three fifths of five per cent of the net proceeds of

the lands lying within the State, arising from sales of such land since 1819, to be appropriated by the legislature *for the encouragement of learning* which fund has accumulated to a very large amount, and has been increased by the Surplus Revenue distributed by act of Congress amongst the different States, and the interest of which sums combined is annually distributed to the different counties of the State, in proportion to the number of children in each County.

There can be no question that the Legislature could use those funds for any kind of schools, they thought proper to establish, there being no limitation in those congressional grants as to the character of those schools.

We will further premise that complainants seem to be under the impression that by common schools such schools are meant in which only the rudiments of learning are taught. But common schools do not mean elementary, primary schools, schools for common people, but means schools open to all, as opposed to private schools. Webster defines a common school: "A school maintained at the public expense and open to all." The word common has no reference to the grade of schools and kind of studies to be taught. "Common" is belonging to the public, not private or exclusive, as we speak of "commonwealth, common good."

It is a matter of history that the "common schools" established by the Puritans in New England were of a superior order, and that many branches, latin included, which now a days are relegated to high schools and accademies, were taught therein.

As under our school law persons up to the age of twenty-one years may avail themselves of the instruction imparted in our common schools, it would appear almost absurd to suppose that nothing but the bare rudiments of learning could be acquired in these institutions.

If we now turn to the provisions of our school law

(Revised Statutes, 1874, p. 963, § 48 and 50) we find in sect. 48, "that the school board shall direct, what branches of study shall he taught," and in sect. 50, "that every school established under the provisions of this act shall be for the instruction in the branches of education prescribed in the qualification for teachers, *and in such other branches, including vocal music and drawing, as the directors or the voters of the district at the annual election of directors may prescribe.*"

In order to overcome these plain provisions of the statute while citing them in their bill, the complainants interpolate into the latter clause of the passage just mentioned by us, the words: of an *English education*, so as to make the law read: and in such other branches of an *English education*, as the directors may prescribe.

But even if the law did read that way, we do not see that it would help their case much. Do all schools, colleges, universities in the United States, or in England become *unenglish*, latinised, germanised or gallicised, because in all these institutions of learning, a few or even many hours in the week are set apart to the studying of ancient or modern languages? The fact is that education while it does furnish a certain and always limited amount of positive knowledge, has to deal principally with the training and disciplining of the mind, so as to make it a fit instrument for the reception and digestion of higher knowledge in riper years, and for analysing and putting to use such acquired knowledge. There is no such thing as an english or an american or a french education otherwise than that instruction is imparted in every country in its own language. It has been a mooted question amongst schoolmen, whether mathematics or the learning of a foreign language, when scientifically and rationally taught, are more apt to sharpen the juvenile mind. But all agree that either does to a more or less extent. If it should so happen, that the possession of a

foreign language would also be of very great direct and practical advantage on account of its being extensively used in the country, the benefit of instruction in such a language can hardly be overrated. The propriety of teaching a foreign language and the decision as to which should be selected, are matters of judgment with the board, and that they have exercised in this case their judgment soundly seems to appear from the fact, stated in the answer, that 90 per cent. of all the children in the Belleville schools take german lessons, while the attendance to such lessons is purely optional with the parents or pupils.

The Supreme Court of Illinois has had occasian to pass upon the powers of school boards in several instances, and its decisions were altogether in favor of leaving to such boards a very large discretion.

In the case of

Rulison et al. *vs.* Post, 79 Ill., 567,

the Supreme Court decided that pupils could not be *compelled* to attend instructions in other and higher branches, than those enumerated, but that such attention must be left optional to the parents or guardians, but the Court said at the same time, "that the school board may undeniably require the teacher to impart instruction in other and higher branches."

The school board having by the act of the legislature power to direct what other and higher branches should be taught in our public schools, the Courts have no control over the matter, and have no authority to designate what shall or shall not be taught in the schools under the charge of that board, or to direct what the board shall do or leave undone in their management of the schools.

The question of the power of the Courts to interfere with the discretion exersised by school boards under a law similar to our own came up in Missouri in the case of Roach

vs. the board of President and directors of the St. Louis Public Schools.

That board acts under a special charter, and its powers are laid down in terms general indeed, but not as broad as those in our own school law relating to school directors. It is, to have charge and control of the Public Schools of the City of St. Louis; to make all rules, ordinances proper for the management of such schools, so that the same be not inconsistent with the laws of the land.

Yet the Circuit Court of St. Louis, as well as the Appellate Court for the St. Louis District, upon a bill for an injunction to enjoin the Board from teaching the higher branches of education, including ancient and modern languages, particularly the German, decided that the plaintiff had no standing in Court and dismissed the bill.

The opinion in the Appellate Court was delivered by Judge Hayden, and is a very able one. In the course of it the Court says: "The complaint in point of fact is not that the defendant (the school board) is not using its fund or exersising its powers for the support of schools, but that the defendant is teaching the children who attend its schools more than the plaintiff thinks should be taught in the public schools. But the plaintiffs presents no standard by which the courts can proceed. The precision and uniformity which judicial action demands find no basis in the notions of any given plaintiff, however well supported by argument, as to what constitutes a proper education to be given in the public schools. But into such notions and into considerations of policy and expediency, the case of the plaintiffs resolves itself." —— "The extent to which it is advisable to educate the people does not address itself to the courts, but to the people themselves, and if they put the power in the hands of particular officers or boards, and it is exercised as conferred, the fact that the power is excessive is no argument against it."

The same question came before the Supreme Court of Ohio.

Board of Education *vs.* Minor, 23 Ohio St. 211.

The law governing the public schools of Cincinnati provides that the board of education "shall have the superintendence of all the schools in said city, organised and established under this act, and from time to time shall make such regulations for the government and instruction of the children therein as to them shall appear proper and expedient, and generally do and perform all matters and things pertaining to the duties of this said office, which may be necessary and proper to promote the education, morals and good conduct of the children instructed in said public schools." (See opinion p. 240.) The Court held that it had no right to interfere with the action of the board, and whether said board enacted wise or unwise regulations, or whether they should or should not be compelled to adopt a certain course, was for the legislature to determine and that the Courts had no power to interfere.

In a very late case decided by our Supreme Court, McCormic *vs.* Burt, opinion filed March 17. 1880, not yet reported, the Court in respect to the power and authority of the Directors of School districts say: "What rules and regulations will best promote the interests of the school under their immediate control, and what branches shall be taught, and what text books shall be used, are matters left to the determination of the directors, and must be settled by them from the best lights they can obtain from any source, keeping always in view the highest good of the whole school." The Court proceed to say "that in such matters they act judicially in a matter involving discretion in relation to the duties of their office."

We do not wish however to be misunderstood. While we contend upon the best authorities that free schools, or even if the words were used common schools, do not mean

primary or rudimentary schools, yet they mean schools, as contradistinguished from academies and universities, where a purely classical or scientific course of studies is pursued. If our schools were attempted to be converted into such institutions by school-boards, they would exercise their discretion unreasonably, and their action might be questioned in the judicial forum.

But under precisely similar laws, and some not as strong as ours, the german language for instance has been taught for many years past in a great many cities and towns in this Union, such as New York, Buffalo, Cleveland, Cincinnati, St. Louis and many others that might be named.

The sections under consideration have received a construction by Newton Bateman, for many years Superintendent of Public Instruction in our State. He published in 1865 the School Laws of Illinois with the official and judicial decisions in relation to common schools. On page 126 of this publication he lays it down that the instruction imparted in our public schools, must be so imparted through the medium of the english language and no other. "But," continues he (page 127), "lest the foregoing provisions should be misunderstood or misapplied, this section (50) closes with the proviso that nothing therein contained shall prevent the teaching in common schools of other and higher branches than those specified. By this proviso all necessary latitude is given for the introduction into our common schools of such additional or higher branches, whether of language or mathematics etc., as may in given circumstances be deemed advisable. It will thus be seen that while the German and other foreign languages cannot be made the teaching language, or medium of communication in our schools, yet they may be introduced and taught to any necessary extent through the medium of English, the same as the Latin or Greek or other additional branches

are taught, and so far from intending to discontinue the teaching in our public schools of modern languages, especially the grand rich old german tongue, I would earnestly encourage the teaching of that language whereever circumstances will admit and expediency recommend the same to be done."

This construction is of course not binding upon the Courts, but the high character of this functionary for intelligence and learning entitles it to great weight.

This construction being given fifteen years ago by one who by law was authorised to give advice and to interpret the school laws, and having been published all over the state, it is strange indeed, that if wrong it has never since been questioned, and that the Legislature has not deemed fit to change the law in that respect, if as complainants content, the law as so construed were *against public policy*.

Mr. Harris, the eminent Superintendent of the Public Schools in St. Louis, places his advocacy of having the German taught in the Public Schools upon the ground amongst others, that it was the best public policy. That were the teaching of German forbidden, thousands of german children would be taken off the public schools and would fail to identify themselves as they should with the American nation. He as well as the President of the School board in Cincinnati (Sands) in his last annual report, attest to the remarkable fact, that the scholars who learn English and German at the same time were for their age much further advanced than those who study English alone.

We can hardly treat seriously the argument of appellants' counsel, that in as much as some time is devoted to the teaching of the German, the expenses of the school are thereby increased, although no additional compensation is paid to those teachers who instruct in that language. It must be recollected that the attendance on the german lesson is optional, and those who do not attend, do not sit

idle but pursue their other studies, while those who do attend learn something considered very valuable by the school-board in lieu of what they may miss.

In the case of McCormick *vs.* Burt, *supra*, the same objection as to loss of time might have been urged. In that case the Supreme Court decided that the school-board had the right to expel a catholic boy, who, the attendance being optional, did not lay aside his books and pursued his studies, while a chapter from King James' translation of the Bible was read. Now the reading of a chapter of King James' translation of the Bible (not exceeding 15 minutes, as the rule prescribed) is not one of the enumerated branches of teaching, and as it took time from other studies, it would according to the nice calculations made by appellants counsel unnecessarily increase the burden of the tax payers. But this bright idea does not seem to have struck the counsel who argued, nor the Court who decided the case.

Much labor is bestowed by appellants's counsel upon the point, that such *other* branches, which the school-board may direct to be taught, cannot possibly embrace the German language. They think that it is no branch of education, or at least of an *English* education. Here again we meet with the interpolation of the word "English", nowhere to be found in the law, and as we have said before, if it were in the law it would not strenghten their position. Those branches, they say, must be of the "same kind", must be "the same as has been mentioned" which is the definition of "*such*", as stated by Webster. They pay no attention to the word "*other*" at all. What the *other* branches are is to be left to the discretion of the board, within reasonable limits, as we have shown before, and can not depend upon the notions of uneducated or half educated men of whom a majority of taxpayers may consist. The law has given that discretion to the board, and there it must remain, unless the Legislature sees proper to restrict it.

In the case of Rulison et al. *vs.* Post, already cited, the Court, while holding that pupils could not be compelled to attend to other branches not enumerated, yet decided that the Board had authority to prescribe what they should be. In that case the disputed branch in question was "book-keeping", which certainly is not the "same" as the enumerated branches, "the same as mentioned before", but is *other* than those enumerated.

But we deem it unnecessary to explain what is so plain, but will merely remark in passing that the appellants counsel several times speaks of *branches of a German education*, as taught in the Belleville schools, while there is simply given one german lesson per day. How a language could be taught without teaching its orthography, its grammar, the mode of reading and writing it, we fail to understand. Those various exercises are not branches of a german education, but only one branch of the school education.

The counsel for appellants cite the case of Richards *vs.* Raymonds, 92 Ill. 612, and seem to draw from it the conclusion that teaching German in a common school would be unconstitutional. But we think that this is a very great mistake. In that case the question was whether the law providing for high schools was constitutional or not. It was contended that the article VIII sect. 1 of the Constitution which provides that "the General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education," was a limitation on the power of the Legislature, and that none but ordinary common schools could be created under this section of the Constitution. In the case before the Court almost innumerable branches of learning were taught in the High School in question amongst others Philosophy (whatever that may mean), Botany, Rhetoric, Latin, Chemistry, Astronomy, Greek, French

and German. Yet the Court decided that the High School law was not unconstitutional, that the language of the Constitution was broad enough to include High Schools in its term of "Free Schools", and in doing so the Court say:

"No definition of Common School is given or specified in the Constitution, nor does that instrument declare what course of studies shall constitute a common school education. How can it be said that a High School is prohibited by the Constitution and not included within the definition of a Common School? The phrase "a common school education" is not easily defined. One might say that a student instructed in reading, writing, geography, english grammar and arithmetic had received a common school education, while another who had more enlarged notions on the subject might insist that history, natural philosophy and algebra should be included. It would thus be impossible to find two persons who would in all respects agree in regard to what a common school education should be. Indeed it is a part of the history of the State, when the Constitution was framed, that there was a great want of uniformity in the course of study prescribed and taught in the common schools of the state. In the larger and more wealthy counties the free schools were more graded and the course of instruction of a high order, while in the poorer counties the old district system was still retained and the course of instruction prescribed of a lower order. At the time of the adoption of the Constitution there was a wide difference of opinion in different parts of the State as to what constitutes a common school education, and we apprehend that a Constitution which would have impaired in any degree the free High School system in existence in many parts of the state, would not have received the approval of the voters of the state. But however that may be, *while the Constitution has not defined what a common school education is and has failed to prescribe a limit, it is no part of the duties of the*

Courts of this State to declare by judicial construction what particular branches of study shall constitute a common school education."

We could not possibly express ourselves better than the Supreme Court has done in that case, to sustain our point. We will barely make an additional remark. When the Constitution of 1870 was framed, the German had been taught in our *Common Schools* and High Schools, for many years in a large number of our cities and towns, particularly in Chicago, and a large number of citizens would never have voted for the Constitution. if they had construed it, as the counsel for appellants wish to do.

We have already referred to the Missouri case, Roach *vs.* Board of Education. The constitutional question was also made there, the Constitution of Missouri providing that the General Assembly shall establish and maintain Free Public Schools (Constitution of 1875, Article XI). We have already seen, that *Public* schools mean *Common* schools. Yet the Court held that this article was no restriction on the School-board in the City of St. Louis, to provide for schools of a higher grade, and for teaching German even in the lower grade. The Legislature of Missouri under a similar provision of the former Constitution has provided by law (acts 1860 p. 90) that all teachers in the public schools should be required to understand the English language, and that *where other languages are taught* the Englich language shall be the medium of communication. In 1865 it was provided, that the Township board might provide for instruction in any of the modern languages in any of the schools of their respective townships, if they deem it advisable (Acts of 1865, adjourned session p. 175). Now all this legislation shows most clearly that the provision of the Constitution, almost identical with our own, was not considered as an obstruction to teach a modern language in a common school, and also proves that the people of Missouri

hold different views as to the usefulness of such a study from those of the appellants. These school laws of Missouri apply to the state at large, and not to the City of St. Louis, which as remarked before has a special act concerning its schools.

While the Legislature of Missouri has implicitly allowed the teaching of modern languages, our Legislature has delegated that power in the most general terms to the Board of School Directors, in allowing them to select other branches, in either case without violating the constitutional provision.

The same question as to high schools being unconstitutional came before the Supreme Court of Michigan. The provision of the Constitution of Michigan is peculiar and seems to be rather restrictive. It reads as follows, Article 13. Education: "The Legislature shall within five years provide for and establish a system of *primary* schools whereby a school shall be kept without charge of tuition at least 3 months in each year in every school district in the State, and all instruction in said schools shall be conducted in the English language."

Under this clause the Supreme Court of Michigan, in the case of

Stewart *vs.* School District, 30 Mich. 69,

decided, Judge Cooley delivering the opinion, that the Legislature could provide for other than primary schools, and could provide for graded and high schools. The Supreme Court of Michigan goes further than our Supreme Court. It does not look upon this provision of the Constitution as a *limitation*, but as mandatory, securing by Constitutional provisions at least a minimum of instruction to all classes of the people free of charge. It is well known that in many States the free school system was a very mooted question, and many plausible reasons were urged against it. Some protestant denominations, as well

as the entire catholic church, counting its millions of votaries, seriously oppose the free school law system, desiring all schools to be confessional schools

To take this exciting question away from ever fluctuating legislative action, Constitutional provisions were enacted guaranteing instruction in the public schools free to every child in the land.

Judge Cooly says Page 80: "While the Legislature was required to make provisions for district schools at least three months every year, no *restriction* was imposed upon its power to establish schools intermediate the common district schools and the university, and we find nothing to indicate an intent to limit their discretion as to the class or grade of schools or as *to the range of studies or grade of instruction which might be provided for the district schools.*

While every provision of a constitution in a general sense may be called a limitation upon the constituted state authorities, to which it may refer, in a more accurate and technical sense, there are many provisions which are not limitations or restrictions. Some are mandatory, requiring a certain action on a certain subject. But such special action by no means exhausts the whole subject, and leaves it except as to the special provision under the control of the general legislative power. A constitution may for instance require a legislature to charter no corporation without providing for personal responsibility of its stock holders. Yet there is no question that the legislature might lay the stockholders under additional restrictions. A constitution may provide as ours has done, for the enactment of a general Banking law or Railroad law, and at the same time require that certain limitations and restrictions shall be inserted in such laws, yet those mandatory provisions would not exhaust the subject, and the legislature in its sovereign capacity could add many other restrictive provisions.

The constitution of 1848 contained almost a little

special code to enable delinquent tax payers to keep their lands and to protect them from sale. But is there any doubt but that the legislature could have added additional provisions, provided they did not come in conflict with the constitutionl provisions?

So we say that even if the constiution had only provided for schools of the most primary character, the legislature could have provided for a higher education in those schools or in high schools, as it had done before under the Constitution of 1848, which did not contain a constitutional provision in regard to the establisment of common schools at all.

A similar decision was made in Massachussetts,

Cushing *vs.* Inhabitants of Newburyport,

10 Metcalf, 508.

Judge Shaw delivered the opinion of the Court.

We do not wish to extend this brief, but refer the Court to the decision itself, quoting but one passage:

"The description of schools which the law *required* towns to maintain was not a description of those which alone it had the *power* to support at the common expense. That Townships having by other laws authority to expend money for public instruction, the general school law establishing mere ordinary town schools during a limited period of the year, was not a *limit* to their power to establish schools for longer periods and extending to instructions in branches of knowledge *beyond those required by statute.*"

But taking even the view that our Supreme Court has expressed in the case of Richards *vs.* Raymond, and on which the case did not turn, under the broad construction given to the Constitution by that Court, that decision amply bears out our position, that neither the Constitution nor the laws of our State forbid the teaching of the German or any other modern language to be taught through the medium of English in our public schools, and that the de-

fendants have not "violated the law", or "flagrantly evaded it," as the appellants' counsel in their misguided zeal have charged, but have carried it out in good faith the same way their predecessors have done for nearly twenty years past, and have been therein supported by a large majority of the citizens and tax payers of that district.

G. & G. A. KOERNER,

for appellees, the Board of Education.